

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAROLYN CARNAHAN, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

BIG FISH GAMES, INC., a Washington
Corporation

Defendant.

No. 2:14-cv-01182

DEFENDANT'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO
RULES 12(b)(6) AND 9(b)

Noted for Consideration: November 14, 2014

I. REQUEST FOR JUDICIAL NOTICE

Defendant Big Fish Games, Inc. ("Big Fish") hereby respectfully requests that the Court take judicial notice of the screenshots attached as Exhibit A to the Declaration of Charles C. Sipos in Support of Defendant's Request for Judicial Notice. This request is made in connection with Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b).

Federal Rule of Evidence 201 provides that a fact is subject to judicial notice if it is one "not subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(1). Judicially noticeable materials may be considered when

DEFENDANT'S REQUEST FOR JUDICIAL
NOTICE (NO. 2:14-CV-01182) – 1

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1 adjudicating a motion to dismiss. *In re Washington Mutual, Inc. Sec's Litig.*, 259 F.R.D. 490,
 2 495 (W.D. Wash. 2009).
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4 Big Fish requests that this Court take judicial notice of the key webpages that are
 5 displayed to customers during the sign-up process for the Big Fish Game Club and which
 6 Plaintiff fails to include in her Complaint. These screenshots are the proper subject of judicial
 7 notice because various steps of the enrollment process on Big Fish's website are referenced at
 8 length in the Complaint. Indeed, the Complaint not only includes detailed descriptions of the
 9 website and sign-up process, select screenshots are pasted directly into the allegations. Compl.
 10 ¶¶ 13-22.
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18 The Ninth Circuit takes an "expansive view" of the incorporation by reference doctrine,
 19 recognizing that "[e]ven if a document is not attached to a complaint, it may be incorporated by
 20 reference into a complaint if the plaintiff refers extensively to the document or the document
 21 forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
 22 2003). The purpose of this expansive approach is to prevent plaintiffs from surviving a motion
 23 to dismiss "by deliberately omitting . . . documents upon which their claims are based." *Swartz*
 24 *v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (internal quotation marks and citation omitted);
 25 *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)
 26 ("Plaintiffs cannot prevent a court from looking at the texts of the documents on which its claim
 27 is based by failing to attach or explicitly cite them."). "The rationale of the 'incorporation by
 28 reference' doctrine applies with equal force to internet pages as it does to printed material. Just
 29 as a reader must absorb a printed statement in the context of the media in which it appears, a
 30 computer user necessarily views web pages in the context of the links through which the user
 31 accessed those pages." *Kniesel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).
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47 Where, as here, a plaintiff's complaint is based on the defendant's alleged disclosures or
 48 lack thereof, a court should judicially notice the screenshots containing those disclosures. *See*
 49 *Ozuna v. Home Capital Funding*, 2009 WL 4544131, at *3 (S.D. Cal. Dec. 1, 2009) (noticing
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1 documents relating to loan origination where plaintiff's complaint "relie[d] on the[] notices and
2 disclosures, or the lack thereof"); *see also In re AIG Advisor Group Sec. Litig.*, 2009 WL
3 382355, at *2 (2d Cir. Feb. 13, 2009) (recognizing that website disclosures incorporated by
4 reference addressed the issue "at the heart of plaintiffs' complaint" and thus "barr[ed] any claim
5 based thereon"). Here, Plaintiff extensively refers to and bases her claims on Big Fish's website
6 and (allegedly omitted) disclosures. *See, e.g.*, Compl. ¶ 12 (alleging "BFG omits informing its
7 customers adequately about the monthly recurring fees"); *id.* ¶ 17 ("BFG omits any information
8 whatsoever about the ongoing charges that the consumer is unwittingly signing up for."); *id.* ¶ 19
9 (alleging "BFG omitted the key information that the membership program has an ongoing
10 monthly cost"); *id.* ¶ 21 ("BFG provides no warning whatsoever during the checkout process that
11 the customer will be charged on a monthly recurring basis."); *id.* ¶ 22 ("The only way that
12 consumers could possibly discover the true terms of BFG's membership program . . . is if he or
13 she (1) actually notices the additional item in their checkout 'Cart,' and (2) takes affirmative
14 steps to click on a small hyperlink labeled 'See Details' . . ."). Because Plaintiff's Complaint is
15 replete with references to Big Fish's website and disclosures—and in fact hinges on Big Fish's
16 alleged failure to disclose the monthly fee of its membership program—those disclosures have
17 been incorporated by reference and are properly the subject of judicial notice.

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19 For the foregoing reasons, Exhibit A may be properly considered by the Court in ruling
20 on Defendant's Motion to Dismiss.
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2 DATED: October 8, 2014

/s/ Susan D. Fahringer

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CERTIFICATE OF SERVICE

On October 8, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

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I certify under penalty of perjury that the foregoing is true and correct.

DATED this 8th day of October, 2014.

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